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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CRAIG MCCARTHY,

Plaintiff-Petitioner,

v.

THE BARK PEKING, her Sails, Equipment, Appurtenances, Etc., and SOUTH STREET SEAPORT MUSEUM,

Defendants-Respondents and Third-Party Plaintiffs,

v.

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THIRD-PARTY DEFENDANT-RESPONDENT THE STATE INSURANCE FUND IN OPPPOSITION TO THE GRANTING OF CERTIORARI

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Facts

The relevant facts are as stated in the brief for defendant-respondent South Street Seaport Museum.

Prefatory Statement

The opinion of the Circuit Court of Appeals for the Second Circuit held that the petitioner could not predicate a courthouse suit on Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act because the Longshoremen's Act was not available to him as a source of Workers' Compensation benefits in the first instance, his remedy being rather under the applicable State law, the New York Workers' Compensation Law, and indeed exclusively so. (*Billy* v. *Consolidated Machine Tool Corp.*, 51 NY 2d 152.) The Court of Appeals accordingly felt no need to address the further question of whether if petitioner had been entitled to Longshoremen's Act benefits he could despite that Act's exclusive remedy provision (33 U.S.C. 905[a]) proceed with his suit for damages against South Street Seaport Museum, his employer, on the theory that the Peking was a vessel, South Street Seaport Museum had a separate identity as the owner of that vessel, and it was negligent in that separate identity (33 U.S.C. 905[b]). This brief will not deal with issue addressed and disposed of by the Court of Appeals' opinion. That would be needless redundancy, for the opinion itself and South Street Seaport's brief have comprehensively dealt with that subject. This brief will, however, concern itself with the question left open, and will show that had the Court of Appeals gone on to address the question of the Peking's status it would have determined it not to be a vessel, but rather a museum piece, and would have dismissed on that additional ground.

POINT I

Since the Peking in its present form and function is not a vessel and South Street Seaport Museum, plaintiff's employer, is a museum and not in the shipping business, the Museum did not have a separate identity as a shipowner for Section 905(b) LHWCA purposes and the exclusive remedy provisions of either or both the LHWCA (33 USC 905) and the New York Workers' Compensation Law (§§ 11, 29[6]) mandate dismissal of the complaint.

The dictionary often points the way when attempt is made to build a claim upon a word rather than upon the word's meaning.

Webster's Third New International Dictionary (1964) contains the following definitions at pages 1490 and 2097:

DEFINITIONS

(See opposite ☞)

mu-se-um \(ˌ)myü'zēəm, ◆ '...\ *n* -s [L *Museum*, fr. Gk *Mouseion*, fr. neut. of *Mouseios* of the Muses, fr. *Mousa* Muse — more at MUSE] **1** *obs* : a scholar's library : STUDY ⟨admitted to an audience in his ~ —Charles Johnstone⟩ **2 a** : an institution devoted to the procurement, care, and display of objects of lasting interest or value ⟨British *Museum*⟩ ⟨American *Museum* of Natural History⟩ **b** : a room, building, or locale where a collection of objects is put on exhibition ⟨art ~⟩ ⟨science ~⟩ ⟨striking outdoor ~, two hundred acres of it —Bernard De Voto⟩ **c** : EXHIBIT, COLLECTION ⟨the little ~ of . . . lore assembled in the foyer —Claudia Cassidy⟩ **3** : something that resembles a museum ⟨the parlor was a ~ of Victorian bric-a-brac⟩ ⟨codes are maintained as no mere ~s of legal rules and principles —F.A.Ogg & Harold Zink⟩

museum piece *n* **1** : an object of lasting interest or value (as an antique) suitable for or preserved in a museum ⟨early pie plates, now *museum pieces* —*Amer. Guide Series: Conn.*⟩ ⟨a *museum piece* volume —Claudia Cassidy⟩ ⟨some classics, no longer appropriate for daily use, become . . . *museum pieces* periodically dusted off by the critics —Waldo Frank⟩ **2** : something antiquated or obsolete : a thing of the past ⟨tended to regard the old clerk of court as a *museum piece*⟩ ⟨the taxicabs . . . are early-century *museum pieces* —E.O.Hauser⟩ ⟨contains the substance of lectures . . . which now are almost dated *museum pieces* —Irwin Edman⟩

ship \'ship\ *n* -s *often attrib* [ME *schip*, *ship*, fr. OE *scip*; akin to OHG *skif* ship, boat, vessel for liquids, ON & Goth *skip* ship, boat, OE *scādan* to divide, separate — more at SHED] **1 a** : any large seagoing boat **b** : a sailing boat having a bowsprit and usu. a square-rigged foremast, mainmast, and mizzenmast each composed of a lower mast, a topmast, a topgallant mast, and sometimes higher masts **2 a** : a boat intended or used for navigation and propelled by power or sail **b** : a boat or structure used for purposes of navigation or intended or used for transportation on a river, sea, ocean, or other navigable water without regard to its form or means of propulsion **3** : a ship's company or crew ⟨the whole ~ cheering the captain⟩ **4** : an incense vessel or boat **5** : one's affairs or good fortune ⟨when his ~ comes in he will pay his debts⟩ **6** : AIRSHIP, AIRPLANE **7** : a part used to move something from one place to another ⟨the ~s of scissors⟩ **8 a** : a unit of at least five sea explorers of the Boy Scouts of America under the leadership of a skipper **b** : a senior girl scout mariner troop

Plainly, the South Street Seaport Museum is just that, a museum; and the Peking is in actuality no longer a ship but is just one of the pieces in the museum's collection.

Museums of natural history or science preserve and display in as lifelike a form and as natural a setting as possible things which once lived. Museums of art display things which are not only art *per se,* such as paintings and sculpture, but also things artistically worked which in their day, but no longer, primarily served every day utilitarian purposes, such as armor, obsolete weapons, furniture, household utensils, etc.; and they even offer the museum viewer a look at things which once were objects of religious worship such as idols and the places in which they were worshipped. As their names denote, seaport museums preserve and present in a seaport setting things which once were ships and other things nautical, which once were used for the purposes for which they were built or fabricated, but now serve to tell us of how and with what men took to the sea in the past.

The Peking is incapable of navigation. It has no sails nor any other motive power; its rudder is frozen. It neither moves in commerce, nor is it intended to be used in transportation as a ship. The Coast Guard says it is not a vessel; the Customs authorities classify it as a hulk. All it is now is a museum piece intended to picture for us against as visually realistic a backdrop as possible what it once was and no longer is, a sailing ship representative of the type of water-borne transportation of its day. Obviously, realistically, in our day the Peking is no more a vessel for Section 905(b) purposes than would be a Viking galley, a Greek bireme, or for that matter Cleopatra's Barge or Noah's Ark (if they still existed, and South Street Seaport was both lucky and wealthy enough to come by them).

That the Peking sits in the water does not change its status from an artifact to a Section 905(b) vessel and give

the Museum two separate statuses vis-a-vis plaintiff for Section 905(b) LHWCA purposes, one as ship repair contractor-employer and the other as vessel owner. It is patent that the Peking is located on the water for at least two practical reasons. First, that gives it a more natural or realistic viewing background. Second, it would obviously be unfeasible to even attempt to put an object of its size and bulk on land or under a roof. It is furthermore obvious that South Street Seaport Museum's only status is that of a museum, and that plaintiff is a museum worker who at times works at the restoration or maintenance of the pieces in the museum's collection.

That the Peking has substantial monetary value all the more demonstrates that it is not a ship for Section 905(b) purposes, for the worth it has is not as a vessel; in that capacity it is absolutely worthless. Indeed, as a ship it would be a white elephant, being incapable of earning even one cent's worth of income as a cargo or passenger carrier. As a ship it would only be a financial drain because of the expenses of maintenance, insurance, etc. On the other hand, it has worth precisely because it is a museum piece, an object of art of antiquity; and because the less of its kind there exist, the greater their value. Just as the great worth even of cracked pieces of ancient pottery or termite-hollowed pieces of ancient furniture lie in their antiquity and rarity, not in their originally intended utility, so too is the Peking's worth. Even if huge outlays of money could restore the Peking to functional use as a vessel, one would no more think of using the Peking for that purpose and thereby endangering its real value, than one would think of using the ancient pottery in one's kitchen to hold food or the ancient furniture in one's living room to sit on.

Analytically, South Street Seaport's ownership of ships of yesteryear no more makes it a Section 905(b) vessel owner than the Museum of Natural History's stuffed

animals makes it a zookeeper or the Metropolitan Museum of Art's collection of ancient weapons makes it a gun owner, armory or gun shop. South Street Seaport Museum's ownership of the Peking no more subjects it to Section 905(b) vessel owner liability than would the Museum of Natural History's ownership of a stuffed tiger subject it to the laws applicable to owners of feral animals. Nor is the Peking in law now a vessel any more than is ancient Egypt's Temple of Dendur now in the New York Metropolitan Museum of Art in law a house of religious worship or the objects in it religious articles.* Today all of these things are only specimens, exhibits, artifacts or works of art, regardless of what they once were or what purpose they once served.

Moreover, the categories of persons who fall within the LHWCA's definitions of the term "vessel" (Section 902[21]), clearly envisages that the ships and shipowners to which the Act applies can be only those actively and actually engaged in commerce, or which realistically have an immediate potential of so functioning. The persons or classes of persons who fall within the "vessel" definition serve only live ships, not hulks or museum pieces, for only live ships have masters, officers and crew members. As to types of enterprises which fall within the "vessel" definition again only live ships need and have agents in their various ports of call to serve their operator's or owner's interests; and third persons charter only live ships and enter into other commercial relationships only with owners of ships which are in fact ships. Hulks and artifacts such as the Peking earn money only as exhibits, not through charter agreements; and they do not need

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* While a child's defacement of the Temple of Dendur or a god statue in it would be an atrocity, that would nonetheless not render his parent sueable under Section 28 of the N. Y. Religious Corporations Law (as added by L. 1981 ch 76) which subjects a parent to civil liability of up to $5000 for the child's malicious destruction of places or articles, etc. of religious worship.

agents for they make no calls at any port; they sit in their outdoor museums just to be visited and admired.

All in all, plaintiff's argument that the South Street Seaport Museum's ownership of the Peking renders it sueable under Section 905(b) premises upon his own refusal to recognize the reality of what is and his insistence that the Peking instead be viewed as what it once was. This argument simply asks all concerned to deny their senses and their reason and substitute fantasy for reality.

The law must focus on the fact of the present day status of the Peking, not on what it was "once upon a time." The plain facts are that the Peking is not now a 905(b) ship and the South Street Seaport Museum is not a 905(b) shipowner; and, accordingly, the plaintiff's exclusive remedy against the South Street Seaport Museum, his employer, is Workers' Compensation benefits under the New York Workers' Compensation Law (§ 11,29[6]; *Billy* v. *Consolidated Mach.*, 51 NY 2d 152), or at best (if the Court of Appeals' holding was wrong on the issue it addressed) under the LHWCA (§ 905[a]), but he most certainly may not sue the South Street Seaport Museum as a vessel owner under Section 905(b) LHWCA for courthouse damages.

Conclusion

The Petition for a Writ of Certiorari should be denied.

August , 1982

Respectfully submitted,

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PHOTOCOPIES OF STATUTES CITED FOLLOW

• The third-party defendant State Insurance Fund is South Street Seaport Museum's Workers' Compensation and Employers' Liability Insurer. As its answer shows, it disclaimed coverage on the ground that it insures only with respect to the Museum's liability in its identity as employer for injuries to employees, and plaintiff McCarthy's claim is premised upon a contention that the Museum's liability to him is not as employer but rather under Section 905(b) LHWCA because of a separate and distinct indentity-status as a shipowner. It is, furthermore, the State Insurance Fund's view that the third-party defendant Northbrook Excess and Surplus Insurance Company, the Museum's General Liability insurer, has the obligations first to defend and, next, if appropriate, to pay, inasmuch as plaintiff's claim is so premised upon an *alleged* status relationship with the Museum which is other than that of employer-employee. Despite the fact that plaintiff's claim of shipowner-status liability on the part of the Museum is one which steers away from the State Insurance Fund's coverage, the transparent baselessness and vexatiousness of the claim to all concerned has compelled the State Insurance Fund to ally itself throughout this litigation with the Museum's position.

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

§ 902. Definitions

When used in this chapter—

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

§ 11. Alternative remedy

The liability of an employer prescribed by the last preceding section[3] shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, spouse, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

§ 29. Remedies of employees; subrogation

6. The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ.

RELIGIOUS CORPORATIONS—DAMAGE CAUSED BY INFANTS —LIABILITY OF PARENTS OR GUARDIANS

Memorandum relating to this chapter, see Executive Memorandum, post

CHAPTER 76

Approved April 21, 1981, effective as provided in section 2

AN ACT to amend the religious corporations law, in relation to liability of a parent or guardian having custody of an infant for certain damages caused by such infant

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The religious corporations law is amended by adding a new section twenty-eight to read as follows:

§ 28. Limited liability of parents or certain legal guardians having custody of an infant for malicious and destructive acts of such infant. 1. Notwithstanding any other provision of law to the contrary, a parent or legal guardian, other than the state or a local social services department or a foster parent, having custody of an infant over ten and less than eighteen years of age, shall, if such infant knowingly, willfully and without authority breaks, defaces, defiles or otherwise damages any house of religious worship or any portion thereof, or any appurtenances thereto, or any religious vestment, book, scroll, art, furniture, ornament, musical instrument, article of silver or plated ware, or any other chattel or property used in connection with religious worship or instruction by a religious corporation, be held liable for such damage or destruction in a civil action brought in a court of competent jurisdiction. In no event shall such liability under this section be in excess of five thousand dollars. It shall be a defense to any action brought hereunder that restitution has been made pursuant to section seven hundred fifty-eight-a of the family court act or paragraph (f) of subdivision two of section 65.10 of the penal law. It shall also

be a defense to such an action brought under this section that such a child has become emancipated from his parent or legal guardian prior to the occurrence of such damage.

In lieu of such liability or in combination therewith, the court may order such infant to perform services for the public good to pay off such damage or destruction.

2. In any action brought hereunder, wherein a verdict for damages was rendered against a parent or legal guardian in an amount of one thousand dollars or more, the court wherein such verdict was returned shall, upon the application of the parent or legal guardian, review the financial ability of the parent or legal guardian to pay the amount of such damages in excess of one thousand dollars. In making such review, the court shall allow the parent or legal guardian the right to present evidence of financial hardship establishing the inability of such parent or legal guardian to pay any or all of the amount of such verdict in excess of one thousand dollars. Subsequent to the completion of such review the court may modify the amount of damages to be paid by a parent or legal guardian as returned in such verdict to an amount within the financial capacity of such parent or legal guardian, provided that no such modification shall reduce the amount of damages to be paid below the amount of one thousand dollars.

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law.

Additions in text indicated by underline; deletions by [brackets]